EDITOR'S NOTE

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ORIGINAL

No. 87-1104

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RALPH KEMP, WARDEN,

Petitioner,

-against-

WILLIAM NEAL MOORE,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh ~~Circuit~~

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent William Neal Moore respectfully requests this Court to deny the petition for writ of certiorari filed by petitioner Ralph M. Kemp. Respondent Moore is filing a cross-petition for writ of certiorari contemporaneously with this brief; he seeks certiorari on that cross-petition only if the Court agrees to grant petitioner Kemp's petition for certiorari.

STATEMENT OF FACTS

Judge Godbold's opinion for the Court of Appeals is, in essence, an intermediate order. It does not grant final relief to Mr. Moore on any ground. Instead, it affirms the dismissal of two constitutional claims (App. 67-68)[1]; remands two additional claims for a consideration of their merits (App. 59, 61); and remands a final claim for consideration of whether the merits should be addressed. (App. 67). Because petitioner Kemp characterizes the opinion of the Court of Appeals almost entirely in hyperbolic terms, an additional statement of the facts is necessary.

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1 Each reference to the Appendices to the Petition for Writ of Certiorari in Kemp v. Moore, No. 87-1104, will be indicated by the abbreviation "App."

A. The Court of Appeals' Disposition of the Estelle v. Smith and Proffitt v. Wainwright Claims

The Court of Appeals held that the district court erred by dismissing two of Mr. Moore's claims, without any consideration of their merits, as abuses of the writ. The first of these claims was asserted by Mr. Moore under Estelle v. Smith, 451 U.S. 454 (1981)[2]; the second, under Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S. 1003 (1983).[3]

In directing the district court to consider the merits of these claims, the Court of Appeals followed a well-trod path. Both Sanders v. United States, 373 U.S. 1 (1963) and Rule 9(b) of the Rules Governing Section 2254 Cases provide that claims presented in successive habeas petitions should be evaluated pursuant to one of two alternative analyses: the first if the claims have already been adjudicated on their merits in the initial petition; the second if the claims are newly asserted in the second petition. Since the district court found that Mr. Moore had not previously litigated either the Smith or the Proffitt claims (App. 51 n.4), the Court of Appeals first concluded that both claims were newly presented and that the relevant issue was "abuse of the writ . . . under Rule 9 (b)." (App. 51).

The Court then looked to Sanders v. United States, which teaches that "[a]bsent deliberate withholding or intentional abandonment of a claim in the first federal petition, the inquiry

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[2] The Smith claim rests on the failure of a state probation officer "to inform petitioner [Moore] of his right to remain silent and of his right to counsel -- or to secure any knowing and intelligent waiver of those rights -- prior to interrogating him, while he was in custody, for purposes of gathering information relevant to sentencing." (Successive Habeas Petition, para.26). Mr. Moore alleges that these acts and omissions violated his rights guaranteed by the Fifth and Sixth Amendments.(Id.)

[3] The Proffitt claim stems from the State's use of "a presentence report that was presented to the trial court in a written document rather than in open court, by witnesses under oath and subject to cross-examination." (Successive Habeas Petition, para. 43). Mr. Moore alleges that this course of action violated his rights to confrontation and cross-examination guaranteed by the Fifth, Sixth and Fourteenth Amendments. (Id.).

. . . [concerning] a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." (App. 51-52).[4] Paraphrasing Fay, the Court of Appeals declared that an "evaluation of a petitioner's conduct necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim."

The en banc Court, however, rejected a focus solely on Mr. Moore's subjective knowledge of available law. Instead, because he had been represented by counsel, the Court of Appeals expressly held that Moore was "chargeable with counsel's actual awareness . . . and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." (App. 52-53) (emphasis added).

After reviewing these controlling legal precedents, the Court of Appeals turned to their application. It first considered whether a reasonably competent counsel should have been chargeable with knowledge of an Estelle v. Smith claim in 1978, when Mr. Moore filed his initial federal petition. Reviewing the state of the law at that time, the Court held:

> [I]n November, 1978, two and a half years before Estelle v. Smith, 451 U.S. 454 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to foresee the fifth and sixth amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of Miranda v. Arizona, 384 U.S. 436 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial.

(App. 53).

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[4] In Sanders, this Court held that "if a different ground is presented by the new application ... consideration of the merits can be avoided [only] . . . if a prisoner deliberately withholds one of two grounds . . . [or] deliberately abandons one of his grounds at the first hearing." 373 U.S. at 17-18, citing Townsend v. Sain, 372 U.S. 266, 291 (1963) and Fay v. Noia, 372 U.S. 391, 438-40 (1963). Townsend provides that newly discovered evidence should be considered on the merits in a federal hearing "[i]f, for any reason not attributable to the inexcusable neglect of petitioner, [the evidence] . . . was not developed" at the prior, state hearing. 373 U.S. at 317. Fay expressly incorporates the standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) -- requiring "an intentional relinquishment or abandonment of a known right or privilege," -- into the consideration of whether a claim should be heard.

The Court of Appeals observed, in support of this holding, that "[i]t was not immediately obvious," after this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), whether " the constitutional protections normally accorded to a defendant's merits trial would be applied to sentencing phases in general, or Georgia's in particular." (App. 54). Only with time were guilt phase protections extended, as in Estelle v. Smith, to the sentencing phase. The Court specifically noted, in fact, that two of the three principal cases relied on in Estelle v. Smith--Presnell v. Georgia, 439 U.S. 14 (1979) and Green v. Georgia, 442 U.S. 95 (1979) -- were not announced until "after Moore's first federal habeas petition was filed in 1978" (App. 54-55), and that the third case -- Gardner v. Florida, 430 U.S. 349 (1977), was no more than a plurality decision. (App. 55).

Marshalling other authority to illustrate the novelty of the Estelle ruling, the Court of Appeals recalled that "[i]n 1980, two years after Moore filed his first petition, the State of Texas was arguing before the United States Supreme Court in Smith that Smith 'was not entitled to the protection of the Fifth Amendment because . . . the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial.'" (App. 55-56). The Court of Appeals also recalled that in Gray v. Lucas, 677 F.2d 1086, 1096 n.9 (5th Cir. 1982), the Fifth Circuit rejected a claim that Gray's trial counsel had been ineffective because he had not foreseen Smith in 1976. (App. 56).

In sum, the Court of Appeals declined to "charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and therefore h[e]ld that his conduct in omitting the claim was not an abuse of the writ warranting dismissal under Rule 9(b)." (App. 59).

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The Court of Appeals applied a similar analysis to Mr. Moore's claim under Proffitt v. Wainwright, which extended Chambers v. Mississippi, 410 U.S. 284 (1973) and similar cases to the sentencing phase of capital cases. Proffitt was not

announced by the Eleventh Circuit until September of 1982, five months after the district court had disposed of Mr. Moore's first federal petition. Under those circumstances, the Court of Appeals held that Mr. Moore's failure to include the Proffitt claim in his first federal petition was not an abuse of the writ.

B. The Court of Appeals' Disposition of the Gardner v. Florida Claim

The Court of Appeals subjected Mr. Moore's Gardner v. Florida claim to a different analysis, since "Gardner was decided in 1977 [and] therefore . . . is not [a] claim based on alleged 'new law' declared since the first petition." (App. 61). The Gardner claim was, in fact, included in Mr. Moore's initial state habeas petition, but it was subsequently omitted by volunteer counsel from Moore's initial federal petition. (App. 61). That volunteer counsel soon abandoned his representation of Mr. Moore; when Moore managed to obtain new volunteer counsel in 1980, the new counsel immediately moved to amend the federal petition to raise the Gardner claim. Although Mr. Moore's initial petition was still pending (and was not acted upon until seven months after new counsel filed the motion to amend), the district court refused to grant the motion.

In her dissent from the panel opinion on this appeal, Judge Kravitch observed that "the omission of [the Gardner claim] may not be attributed to intentional withholding or inexcusable neglect, for it is evident that Moore actively sought to have the district court address the claims during the pendency of his first habeas proceeding." (App. 38). Nevertheless, a majority of the full Court of Appeals reasoned that Mr. Moore's unsuccessful attempt to amend his first federal petition to add the Gardner claim was "at most a factor to be considered in answering the question of whether that claim may be denied in the [second] petition on abuse of the writ grounds." (App. 63). The Court concluded, "We cannot say that the district court . . . erred in finding that the failure to include this claim in the first petition was an abuse of the writ." (App. 64).

The majority went on to note, however, that even when abuse of the writ has been found, Rule 9(b) directs a habeas court to determine whether the "ends of justice" might require the claim to be heard on its merits. The Court turned for guidance to the three-judge plurality of the Court in Kuhlmann v. Wilson, 477 U.S. 436 (1986), which suggested that "the ends of justice" might require a "colorable showing of factual innocence." (App. 65).

The Court of Appeals deferred a final holding on whether factual innocence would in all cases be a necessary condition for the application of the ends-of justice-exception. (App. 65). It nevertheless proceeded to evaluate Mr. Moore's claim as if he were obligated to meet the Kuhlmann standard to prevail. Noting that "[s]ome adjustment is required to apply this test . . . to alleged constitutional errors in capital sentencing," (App. 65), the Court of Appeals sought illumination from this Court's opinions in Smith v. Murray, 477 U.S. 527 (1986) and Murray v. Carrier, 477 U.S. 478 (1986), which ask -- in circumstance where counsel has failed without "cause" to object at trial to a constitutional violation -- whether

> the alleged constitutional error . . . precluded the development of true fact . . . [or] resulted in the admission of false ones.

Smith v. Murray, supra, 477 U.S. at 556.

The Court of Appeals adopted this strict standard to determine whether the district court should have reached the merits of Mr. Moore's claim. Since the district court had in fact expressly acknowledged a "'sufficient likelihood . . . that a wrongful sentence was imposed based on inadequate information,'" (App. 66; see App. 26-27), and suggested that "'corrected information would have materially altered the profile before the [sentencing] judge,'" (App. 67; see App. 27), the Court of Appeals remanded the Gardner claim. The Court's approach was cautious; because "[t]he district court did not have available to it the guidance given by the Supreme Court in Smith v. Murray," (App. 66), the Court declined to resolve the "ends-of-justice" issue for itself. Instead, it invited the district

court to determine, in the first instance, "whether the ends of justice require it to consider the merits of this claim." (App. 67).

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS FOLLOWED CLEAR, WELL-ESTABLISHED PRECEDENT IN HOLDING THAT MOORE WAS NOT "INEXCUSABLY NEGLECTFUL" WHEN HE FAILED TO ASSERT ESTELLE v. SMITH AND PROFFITT v. WAINWRIGHT CLAIMS IN HIS INITIAL HABEAS PETITION FILED IN MID-1978

Petitioner Kemp contends that certiorari is warranted in this case because "there exists no guidance from this Court as to the type of proof sufficient to establish the 'new law' exception to the abuse of the writ doctrine." (Pet. Cert. 7).[5] While acknowledging that Rule 9(b) and the Advisory Committee Notes to Rule 9 address the new law issue (Pet. Cert. 8-9), Kemp calls for additional case law "to flesh out the concept of 'excusable neglect' or 'inexcusable neglect' with reference to new law claims." (Pet. Cert. 10-11).

Kemp suggests that, because it lacked definitive guidance, the Court of Appeals committed three principal errors, warranting this Court's review. First, he contends, that the Court of Appeals "inappropriately create[d] a subjective, rather than objective, test for determining whether a claim could have been raised previously or is based on 'new law' . . . a standard which focuses predominately [sic] on a petitioner's subjective knowledge . . . rather than a petitioner's actual conduct." (Pet. Cert. 11). Second, Kemp claims, the Court's new standard removed "the burden of proof . . . from the petitioner, and place[d it] on the State." (Pet. Cert. 12). Third, he argues, the Court "graft[ed] the foreseeability requirement of procedural default causes onto the abuse of the writ doctrine . . . dangerously afford[ing] a means for a petitioner to cavalierly excuse his conduct . . . by stating that the legal principle . . . was 'not

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[5] Each reference to he petition for writ of certiorari filed by petitioner Kemp in Kemp v. Moore, No. 87-1104, will be indicated by the abbreviation "Pet. Cert."

foreseeable by counsel.'" (Id.). In sum, Kemp asserts that the Court of Appeals' opinion, if not reviewed, will "allow[] habeas petitioners to use their counsel as convenient excuses . . . [creating] a totally subjective and unworkable standard." (Pet. Cert. 13).

These arguments border on the frivolous. As our Statement of Facts demonstrates, the Court of Appeals proceeded step-by-step to follow the well settled precedents of this Court and Rule 9(b). Read together, Sanders and Townsend expound clearly and in detail both the "new law" standard and the concept of "inexcusable neglect." These standards have proven so straightforward and serviceable that further elaboration has never been deemed necessary. The lower federal courts, including the Eleventh Circuit, have regularly employed them without difficulty. See, e.g., Jones v. Estelle, 722 F.2d 159, 165-67 (5th Cir. 1983)(en banc); McCorquodale v. Kemp, 829 F.2d 1035 (11th Cir. 1987); Adams v. Dugger, 816 F.2d 1493, 1495-96 (11th Cir. 1987)(on rehearing).

Here, the Court of Appeals identified the appropriate standards and correctly applied them to the issues presented by this case: whether Estelle v. Smith and Proffitt v. Wainwright constituted "new law" in mid-1978 when Mr. Moore's first federal habeas petition was filed. The answer to that question, indeed, rests on far more than the basic fact that Smith and Proffitt were not decided for three or more years after Mr. Moore's federal petition was filed. In truth, the entire body of law governing capital sentencing proceedings, as this Court knows, underwent dramatic and unpredictable change in the years between 1976 and 1983. Especially prior to the Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the full significance of capital sentencing proceedings and the constellation of procedural protections that would eventually be applicable to them had scarcely become apparent. See, e.g., Lockett v. Ohio, 438 U.S. at 602 ("[i]n the last decade many of the States have been obliged to revise their death penalty statutes . . . [t]he

signals from this Court have not, however, always been easy to decipher"); id. at 632 (Rehnquist, J., concurring and dissenting)("[a] majority of the Court has yet to endorse the course [of] . . . using the Eighth Amendment as a device for importing into the trial of capital cases extremely stringent procedural restraints"); Bullington v. Missouri, 451 U.S. 430 (1981)(extending double jeopardy protections for the first time to capital sentencing proceedings); Hitchcock v. Dugger, __U.S.__, 95 L.Ed.2d 347, 352 (1987)(noting the confusion among Florida bench and bar in the late 1970's about the operation of Florida's sentencing procedures).

Petitioner Kemp has in fact cited not a single case, and we know of none, in which the Smith and Proffitt holdings were applied to the sentencing phases of capital trials prior to 1978. To hold that Mr. Moore or his counsel were "inexcusably negligent" for failure to have asserted such claims would have blinked the legal realities as they existed in mid-1978. As this Court cautioned in Strickland v. Washington, 466 U.S. 668, 689 (1984), "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Viewed without benefit of hindsight, the omission of Smith and Proffitt claims in a 1978 federal habeas petition was simply not "inexcusable" conduct for "reasonably competent counsel," since the claims are themselves novel extensions of Eighth Amendment principles that were only beginning in 1978 to assume their present doctrinal form. Cf. Antone v. Dugger, 465 U.S. 200, 206 (1984)(the "applicant hardly can contend that these claims were unknown to him at that time"); Woodard v. Hutchins, 464 U.S. 377 (1984)(same).

The formulation employed by the Court of Appeals for assessing these new-law claims, moreover, is in certain respects less favorable to Mr. Moore than is Sanders itself. Sanders appears to incorporate Fay's requirement that claims may not be foreclosed without evidence of the "considered choice of the petitioner" himself. See Fay v. Noia, 372 U.S. at 439, cited in

Sanders v. United States, supra, 373 U.S. at 18. By contrast, the Court of Appeals held that Mr. Moore was chargeable not only with his own knowledge and that of his counsel but also with "the knowledge that would have been possessed by reasonably competent counsel." (App. 53).

Such a standard, of course, is the antithesis of a "purely subjective test." It does not, as Kemp charges, "focus on a petitioner's subjective knowledge." (Pet. Cert. 11). Instead, it looks to what the habeas applicant or his counsel should have known. Notwithstanding his good faith, a habeas applicant under the Court of Appeals' formulation will be held to have abused the writ if he omits, from his initial petition, claims that ought to have been recognized, but were not. Petitioner Kemp's characterization of the lower court's opinion simply won't fit the facts.

It is impossible seriously to claim, moreover, that the lower court's opinion shifts "the burden of proof . . . on the State," as Kemp charges. Nothing in the language of the majority opinion even addresses the burden-of-proof issue, much less compels a departure from settled law. The Eleventh Circuit, both before and after its decision in Moore v. Kemp, has firmly adhered to the principle that successive habeas applicants must bear the full burden of explaining their failure to have included newly-asserted claims in their initial petitions. See, e.g., McCorquodale v. Kemp, 832 F.2d 543, 544 (11th Cir. 1987) ("[i]f the state alleges abuse of the writ, the burden is on the plaintiff to rebut this contention"); Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985)(same).

Finally, if anyone appears to advocate "graft[ing] the foreseeability requirement of procedural default cases onto the abuse of the writ doctrine," it is the Court of Appeals dissenters in Moore, not the majority (Pet. Cert. 12). The dissenters repeatedly employ the language of the procedural default cases (for example citing Reed v. Ross, 468 U.S.1, 17 (1984) for the proposition that "the principles articulated in

Estelle v. Smith, were [not] the type of `"new '"' constitutional rule . . . that might excuse a habeas petitioner." (App. 97)(Tjoflat, J., concurring and dissenting). See also App.104-05 n.32 (citing Engle v. Isaac, 456 U.S. 107 (1982) to fault Mr. Moore's counsel for failing to anticipate Smith.)) The majority, by contrast, plainly recognizes and honors throughout its opinion the distinction between strict rules of procedural forfeiture and the equitably-based principles set forth in Sanders and Rule 9(b).

II

THE MAJORITY'S TREATMENT OF THE "ENDS OF JUSTICE" ISSUE PRESENTED BY MOORE'S GARDNER CLAIM FOLLOWS THE PRECISE ANALYTICAL FRAMEWORK SUGGESTED BY THIS COURT. MOREOVER, THE ISSUE IS NOT RIPE FOR REVIEW

Petitioner Kemp also contends that "this case warrants review with respect to the application of the ends of justice test to successive applications [which] . . . seek to relitigate issues relating to the sentencing phase . . . [that] have been previously adjudicated adversely to the petitioner." (Pet. Cert. 14)(emphasis added).

Mr. Moore is at a loss to discern how this issue could properly be addressed in his case, since the only claim to which Court of Appeals applied an ends-of-justice analysis -- the Gardner v. Florida claim (see App. 64-67) -- is one that no federal court has ever adjudicated on its merits. Whatever the ends of justice may require when, as in Kuhlmann v. Wilson, 477 U.S. 436 (1986), an applicant attempts to secure a second ruling on his constitutional claims, it will not likely govern the disposition of Mr. Moore's Gardner claim, which was never heard or decided by the district court.

Kemp also urges the Court to grant certiorari to consider Judge Hill's suggestion, set forth in his dissenting opinion in this case, that (i) the ends of justice, as the plurality in Kuhlman urged, should require proof of a colorable claim of factual innocence (see App. 14-15, citing App. 119); and (ii) that in capital sentencing proceedings, such a showing should

entail "innocence of any statutory aggravating circumstances." (Id.).

As an initial matter, we must point out that such a holding is not foreclosed to the Court of Appeals, even in Mr. Moore's own case. The judgment of the court merely remands the Gardner claim for further consideration by the district court. If either party is dissatisfied by the district court's eventual holding, the Court of Appeals will have a further opportunity to consider the matter. At every juncture, petitioner Kemp will presumably have a full opportunity to contend for Judge Hill's proposed new rule. To invite this Court, however, to review, at this point, what is presently no more than a remand order, is to urge an imprudent use of the Court's limited certiorari resources.

Furthermore, the tentative analysis suggested by the Court of Appeals in its opinion -- which follows the Court's own analysis of a "fundamental miscarriage of justice" under Murray v. Carrier and Smith v. Murray -- is far more consonant both with the equitable foundations of the Great Writ and with the inherently "subjective 'unique individualized judgment[s]'" required in capital sentencing decisions, Turner v. Murray, __U.S.__, 90 L.Ed.2d 27,35 (1986), than is any mechanical rule that would foreclose all further inquiry once "guilt" of an aggravating circumstance had been found. Moreover, since the district court has suggested that, if the merits of Mr. Moore's claim were reached, it would likely find that "a wrongful sentence [had been] . . . imposed based on inadequate information," (App. 66; see App. 26-27), it would be far preferable for the record to be fully developed before this issue is presented to this Court.

CONCLUSION

The petition for certiorari should be denied.

Dated: January 27, 1988

Respectfully submitted,

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